83-633

No.

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1983

ROBERT K. BELL ENTERPRISES, INC.,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR CERTIORARI

Bradford S. Baker
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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Must an employer exhaust its' administrative remedies under the Occupational Safety and Health Act, 29 USC §651 et seq before said employer may challenge in a United States District Court the constitutionality of a warrant issued by the United States Magistrate of said District Court?

2. In the exercise of its' equitable power, should a United States District Court refrain from granting relief to an employer seeking a declaratory judgment as to the constitutionality of a warrant issued by the United States Magistrate of said District Court?

3. When OSHA representatives attempt an inspection without a warrant but are denied entry, application is made and a warrant is obtained from a United States Magistrate, an inspection is then permitted and made pursuant to the warrant, the

Secretary of Labor issues a citation as a result of the inspection, the employer files a timely notice of contest, and the Secretary of Labor then files a complaint, when was the administrative process commenced?

4. At what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without having first to exhaust administrative remedies?

5. If exhaustion of administrative remedies is required, what remedy does an employer have against unconstitutional OSHA inspections and unconstitutional warrants issued by a United States Magistrate if the Secretary of Labor elects not to initiate any administrative citation proceedings or elects to later dismiss such proceedings, or if such proceedings are dismissed on grounds other than the validity or constitutionality of the warrant,

thereby precluding any review of the actions of the Secretary of Labor or the United States Magistrate by the Occupational Safety and Health Review Commission or the United States Court of Appeals under 29 USC §660?

PARTIES TO PROCEEDING IN COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit were:

ROBERT K. BELL ENTERPRISES, INC.,
Plaintiff-Appellant,

RAYMOND J. DONOVAN, Successor to Ray Marshall, Secretary of Labor, United States Department of Labor; EULA BINGHAM, Assistant Secretary of Labor, United States Department of Labor, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; JAMES P. JOHNSON, OSHA Acting Area Director; DERL W. HOUGHTON, OSHA Compliance Officer; and the OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION, Defendants-Appellees.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, see Appendix A, is officially reported at 710 F. 2d 673 (1983). The judgment of the United States District Court for the Northern District of Oklahoma is not officially reported; however, it is unofficially reported at CCH 1981 OHSD §25,433 and is attached as Appendix C.

JURISDICTION

The opinion and judgment of the Tenth Circuit Court of Appeals was rendered on June 20, 1983. On July 1, 1983 Robert K. Bell Enterprises, Inc. filed its Petition for Rehearing. On July 27, 1983, the Tenth Circuit Court of Appeals entered its Order denying Appellant's Petition for Rehearing. See Appendix B. The jurisdiction of this Court rests on 28 USC §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The inspection in this case was purportedly conducted under Section 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 USC §657(f)(1), which provides:

> (f)(1) Any employees or representative of employees who believe that a violation of a safety or

health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary of his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section.

If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

The enforcement procedures and preservation of judicial review were conducted under 29 USC §659 (a), which provides:

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a rea-

sonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretaty that he wishes to contest the citation or proposed assessment of penalty. If, within, fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to

review by any court or agency.

Judicial review is provided for in 29 USC §660(a) which provides:

> (a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the

court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the

failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it

shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28. Petitions filed under this subsection shall be heard expeditiously.

STATEMENT OF THE CASE

On June 14, 1978, OSHA was denied permission to conduct an inspection without a warrant at Bell's Amusement Park in Tulsa, Oklahoma. On August 24, 1978, OSHA applied to a United States Magistrate for the Northern District of Oklahoma for a warrant. The application did not reveal to the Magistrate anything about the person making a complaint about Bell's. On August 24, 1978, the United States Magistrate issued a warrant authorizing OSHA to inspect the entire premises and records of Bell's. Pursuant to the warrant, Bell's allowed the inspection.

On August 30, 1978, OSHA issued a citation alleging violations. On September 15, 1978, Bell's gave its Notice of Contest of said citation to the OSHA area director in Tulsa, Oklahoma. Bell's never filed any preliminary motions or answers and never participated in any administra-

tive hearings or negotiations.

Bell's filed a complaint in the Northern District of Oklahoma seeking, among other things, a declaratory judgment under 28 USC §2201 that the inspection warrant and inspection were unconstitutional. The basis for federal jurisdiction in this court of first instance was 28 USC §1331, 1337, 1346 (a)(2), 29 USC §651 et seq., the Fourth Amendment to the Constitution of the United States and Article 3, Section 2 of the Constitution of the United States.

The Occupational Safety and Health Review Commission stayed administrative proceedings pending a decision by the district court.

OSHA moved to dismiss Bell's complaint, alleging lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted on the grounds that the warrant was valid as a matter of law. All parties filed opposing

briefs.

A hearing was held before the United States Magistrate assigned to the case who on April 24, 1979, found that OSHA's motion to dismiss should be sustained for lack of jurisdiction. See Appendix D. Bell's petitioned to set aside said findings and recommendations and both parties filed briefs.

On August 10, 1979, the district judge to whom the case had been transferred issued an order abating the case pending the decision of the Tenth Circuit Court of Appeals in Marshall v. Horn Seed Co., Inc., 647 F 2d 96 (10th Circuit 1981).

On May 20, 1981, a different district judge to whom the case had been transferred entered a final order adopting the findings of the United States Magistrate, sustaining defendant's motion to dismiss and dismissing plaintiff's complaint, concluding that Bell's must exhaust its administrative remedies before it could challenge the constitutionali-

ty of a warrant and inspection. See Appendix C. The magistrate and the court failed to find that Bell's sought a declaratory judgment under 28 USC §2201 even though Bell's specifically referred to said statute and prayed for a judgment declaring the warrant and inspection unconstitutional.

The magistrate and the court found that Bell's notice of contest invoked the jurisdiction of the OSHRC and implied that Bell's could have brought its action in the court below had Bell's not filed its Notice of Contest with the OSHA area director.

Bell's timely appealed to the Tenth Circuit Court of Appeals.

Meanwhile, Bell's motion for a stay pending appeal having been denied, the OSHRC lifted its stay of the administrative proceedings and OSHA proceeded to press its administrative action against

Bell's. An administrative hearing was ultimately held and the administrative law judge ordered the citation against Bell's vacated on the ground that the Secretary of Labor failed to show jurisdiction over Bell's as an employer effecting interstate commerce. The Secretary appealed that order to the OSHRC where the matter is now pending.

On June 20, 1983, the Tenth Circuit Court of Appeals affirmed the decision of the district court and on July 27, 1983 entered its order denying Bell's timely petition for rehearing. See Appendix A and B.

In Bell's complaint in the district court which is the subject matter of this appeal, Bell's raised no issues of fact but only issues of law, namely, the constitutional issues of law as to the validity of the warrant and inspection.

In affirming the district court,

the Tenth Circuit Court of Appeals held what it considered a majority of circuit courts have held, namely, "that a district court should decline to exercise jurisdiction where the administrative process has been commenced, and that the employer should await final administrative action and then obtain judicial review by the appropriate Court of Appeals."

Bell's now petitions this court to grant certiorrai to review and determine whether or not an employer must exhaust its administrative remedies or a district court should refrain from granting relief in the exercise of its equitable power when the employer is seeking a declaratory judgment as to the constitutionality of a warrant issued by a magistrate of said district court, for this court to review and determine when the administrative process has in fact been commenced and

then at what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without having first to exhaust administrative remedies, and for this court to review and determine what remedy an employer has against unconstitutional inspections and warrants if the employer must exhaust administrative remedies and the issue of the warrant's validity is lost along the administrative pathway.

REASONS THE WRIT SHOULD BE GRANTED

A. The Tenth Circuit Court of Appeals has rendered a decision in this case which is in conflict with the decision of another federal court of appeals on the same matter. The Seventh Circuit Court of Appeals has held that an employer must not exhaust its administrative remedies prior to obtaining judicial relief from a Unites States District Court where the employer is challen-

ging the validity of an inspection warrant on constitutional grounds, and that the district court has inherent jurisdiction to review the constitutionality of its own magistrates warrant, either before or after it is executed. Weyerhaeuser v. Marshall, 592 F 2d 373 (Seventh Circuit 1979).

The Tenth Circuit Court of Appeals has rendered a decision also in conflict with the First Circuit which required exhaution of administrative remedies because there were questions of statutory interpretation needing a factual record before the OSHRC and because the employer had not made a sufficiently clear showing of a Fourth Amendment violation to justify extraordinary relief. In re Worksite Inspection of Quality Products, 592 F 2d 611 (First Circuit 1979). In this case there was no question of statutory construction or any factual issue requiring

an administrative record and Bell's had made a clear showing of a Fourth Amendment violation.

The affidavit requesting the warrant did not state whether the complaint was received by the affiant or by some other OSHA official. The affidavit does not inform the magistrate as to the source of the complaint or even whether or not the source of the complaint was an employee. The complaint was not attached to the affidavit and application for the warrant. The application requested and the warrant authorized the inspection of the entire premises and all the records. These are clearly violations of Bell's Fourth Amendment rights. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Marshall v. Hornseed Co., Inc., 647 F 2d 96 (Tenth Circuit 1981).

The Tenth Circuit Court of Appeals has rendered a decision also in conflict

with the decisions of the Third Circuit which has held that employers need not first exhaust administrative remedies unless a factual record is necessary. Dravo Corporation v. Marshall, 5BNA OSHC 2057 (W.D. Pa., 1977), aff'd 578 F 2d 1373 (Third Circuit 1978); Babcock v. Marshall, 610 F 2d 1128 (Third Circuit 1979); Marshall v. North American Car Co., 626 F 2d 320 (Third Circuit 1980); and Susquehanna Valley Alliance v. Three Mile Island, 619 F 2d 231 (1980).

It is not necessary to develop a factual record to aid in determining the constitutional validity of a warrant. In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge. Spinelli v. United States, 393 U.S. 410, 413 n. 3 (1969).

Therefore, the Writ of Certiorrai should be granted since the Tenth Circuit

Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

B. The Tenth Circuit Court of Appeals has decided an important question of federal law which to the courts of appeals apparently has not been, but should be, settled by this court. In addition to the above cases with different holdings on the same matter, there are three other circuits which have expressed various findings and holdings with regard to similiar issues. Baldwin Metals Co. vs. Donovan, 642 F 2d 768, 771 (Fifth Circuit 1981); Marshall vs. Central Mine Equipment Co., 608 F 2d 719 (Eighth Circuit 1979); In the Matter of J. R. Simplot Co., 640 F 2d 1134 (Ninth Circuit 1981). For example, the Fifth Circuit (Baldwin, supra) agrees with the Seventh Circuit (Weyerhaeuser, supra) that

a factual record is not required and that the interest of agency expertise also does not require exhaustion of administrative remedies, but then disagrees with the Seventh Circuit and claims that the constitutional issues may be mooted by an OSHA decision in favor of the employer.

Thus, the Tenth Circuit Court of Appeals has decided an important question of federal law which, at least in the eyes of the circuits, has not been, but should be settled by this court, and thus the writ should be granted.

C. The Tenth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.

This court has held that a company has a Fourth Amendment right to conduct its business free of unreasonable administrative inspections. Michigan v. Tyler, 436 U.S. 499, 504, 505 (1978); Marshall v.

Barlow's, Inc., supra; and See v. Seattle, 387 U.S. 541 (1967).

This court has held that United States District Courts have jurisdiction and complainants do not have to exhaust their administrative remedies where the only issues presented are constitutional questions of fundamental law. Public Utilities Commission v. United States, 355 U.S. 534, at 539, 2 L.Ed. 2d 470 (1958).

Exhaustion may be required only when (1) it is necessary to develop a factual record to aid in determining a constitutional question; (2) the agency decision may make the constitutional issue moot; (3) specialized and complex issues require application of agency expertise; and (4) the agency should be given a chance to correct its own errors. McKart v. United States, 395 U.S. 185, (1969).

It is not necessary to develop a factual record to aid in determining the

constitutional validity of a warrant. In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge. Spinelli v. United States, 393 U.S. 410, 413 n. 3 (1969).

The agency decision cannot make the constitutional issue moot. Regardless of the agency decision, the constitutional issue of whether or not there was a violation of the Fourth Amendment would be determinative of whether or not the federal agent was liable for damages consequent upon his unconstitutional conduct. Bivens vs. Six Unknown Federal Agents, 403 U.S. 388, 389 (1971).

Furthermore, a declaratory judgment that a warrant and a search pursuant thereto are in violation of the Fourth Amendment to the Constitution of the United States serves many very important purposes. It not only informs the employer that he does

not have to permit the same unlawful intrusion on private property in the future, but it informs and hopefully deters government inspectors and U.S. Magistrates from authorizing and conducting illegal searches. The decision of this court in Barlow's, supra, was a declaratory judgment.

This court has not found specialized and complex issues requiring application of agency expertise in determining the necessity for and requirements of an inspection warrant. Marshall v. Barlow's, Inc., supra, Camara v. Municipal Court, 387 U.S. 523, 528, 18 L.ed 2d, 930, 87 S.Ct. 1727 (1967); See v. Seattle, supra.

This court did not give the Secretary of Labor a chance to correct its own errors in Marshall vs. Barlow's, Inc., supra.

Furthermore, part of the error committed lies with the United States Magistrate who issued the unlawful warrant and it is the responsibility of the courts, ultimate-

ly this court, to correct such an error by holding that the warrant and inspection pursuant thereto were in violation of the rights of Bell's under the Fourth Amendment to the Constitution of the United States.

D. The issues herein are important questions of federal law.

An employer has a Fourth Amendment right to conduct his business free of unreasonable administrative inspections. An employer needs to know what procedure he can and cannot follow in order to have a court determine whether or not his Fourth Amendment rights have been violated. At what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without first exhausting administrative remedies. What actions by an employer preclude an employer from obtaining such judicial review prior to exhaustion of administrative remedies

and make the administrative process the exclusive remedy. Must an employer refuse an inspection even with the warrant and risk contempt in order to insure judicial review of an unconstitutional warrant? When does the administrative process commence and if exhaustion of administrative remedies is required, what remedy does an employer have against unconstitutional warrants if the constitutional issue is lost in the administrative process? Must an employer exhaust its administrative remedies when the only issue he is raising is the fundamental question of law concerning the unconstitutionality of the warrant?

CONCLUSION

The Tenth Circuit Court of Appeals has rendered a decision directly in conflict with the Seventh Circuit on the same matter; the Tenth Circuit has deci-

ded an important question of federal law concerning Fourth Amendment rights in a way in conflict with applicable decisions of this Court but which in the eyes of the circuit courts has not been, but should be, settled by this Court.

Respectfully submitted,

BRADFORD S. BAKER
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CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorrai has been furnished to the following counsel of record and Solicitor General by United States mail, on this 14 day of Oct, 1983:

Mr. James E. Culp, Mr. James E. White, Mr. T. Timothy Ryan, Jr., Mr. Frank A. White, Mr. Allen H. Feldman, Mr. Charles I. Hadden,

U. S. Department of Labor, Office of the Solicitor, 200 Constitution Ave., N.W., Room S-4004, Washington, DC 20210

Mr. Frank Keating, U.S. Attorney, Ms. Paula S. Ogg, Mr. Philard L. Rounds, Jr., Assistants, 460 U.S. Courthouse, Tulsa, Oklahoma 74103

Mr. Paul A. LaFranchise, Sr., U.S. Occupational Safety & Health Review Commission, 1825 K Street, N.W., Suite 601, Washington, DC 20006

Solicitor General, Department of Justice, Washington, DC 20530

Brad Baker

BRADFORD S. BAKER

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-1677

ROBERT K. BELL ENTERPRISES, INC., an Oklahoma corporation,	)
Plaintiff-Appellant,	)
vs.	)
RAYMOND J. DONOVAN, Successor to Ray Marshall, Secretary of Labor, et al,	)
Defendants-Appellees.	)

Appeal from the United States District Court For the Northern District of Oklahoma
(D.C. No. 78-C-545-E)

June 20, 1983
Rehearing Denied July 27, 1983

Bradford S. Baker of Tips, Gibson, Crewson & Baker, Tulsa, Oklahoma, for Plaintiff-Appellant.

James E. Culp, Attorney (James E. White, Regional Solicitor; T. Timothy Ryan, Jr., Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; Allen H. Feldman, Counsel for Appellate Litigation; and Charles I. Hadden, Assistant Counsel for Appellate Litigation; with him on the brief), U. S. Department of Labor, Washington, D. C., for Defendants-Appellees.

Before McWILLIAMS, BREITENSTEIN, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

The present controversy concerns the efforts of the Occupational Safety and Health Administration to inspect the premises of Robert K. Bell Enterprises, Inc. Bell operates an amusement park in Tulsa, Oklahoma. OSHA's Tulsa area office received a complaint that there were several hazardous working conditions at Bell's park. Pursuant to 29 U.S.C. §657(f)(1), OSHA's

representatives appeared at Bell's park to conduct an inspection. Bell denied them entry. The Secretary thereafter applied to a United States Magistrate for an inspection warrant and was granted one. Pursuant to the warrant, a compliance officer appeared at Bell's premises and was permitted by company to make an inspection. As a result of its inspection, the Secretary issued a citation alleging a serious violation of the Act for failing to adequately guard pulleys and belts on its "Scrambler" ride and proposing a $200 penalty. In response to the Secretary's citation, Bell filed a timely notice of contest. The Secretary then filed a complaint with OSHA.

It was at this juncture that Bell brought the present proceeding in the United States District Court for the Northern District of Oklahoma. Bell named the Secretary, OSHA, and several officials of OSHA as defendants and sought declaratory

judgment and injunctive relief. Specifically, Bell asked the district court to enjoin the defendants from taking further administrative action against it, and to declare that the inspection and the use of evidence derived from the inspection were in violation of Bell's Fourth Amendment rights. Upon the institution of the present action, the Review Commission stayed further administrative proceedings pending resolution of the district court proceeding instituted by Bell.

The Secretary filed a motion to dismiss Bell's action for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted. This motion was granted by the district court, which declined to exercise jurisdiction because Bell had failed to exhaust its administrative remedies. Bell filed a notice of appeal from such dismissal. Bell's request for an injunction pending appeal was denied, first by the district

court and then by this Court.*

Prior to 1978, it was thought by many that 29 U.S.C. §657(a) authorized warrantless searches of plant sites by OSHA officials. The Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) held, however, that such warrantless searches violated the Fourth Amendment. Since Barlow's, OSHA officials, in the absence of consent on the part of an employer, have obtained search warrants in aid of their inspection efforts.

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*We are advised by Bell's supplemental brief that after our denial of its request for an injunction pending appeal, the Secretary proceeded to press its administrative action against Bell. In connection therewith, an Administrative Law Judge ordered the citation vacated on the ground that the Secretary failed to show that Bell is an employer affecting interstate commerce. The Secretary has appealed that order to the Review Commission, where, insofar as we are advised, that matter is now pending.

The courts have, thereafter, been faced with the recurring problem of when, where, and how challenges to OSHA search warrants may be made. We are here faced with such problem.

As above indicated, the district court in the instant case declined to exercise jurisdiction, holding that under the circumstances Bell should exhaust its administrative remedies. In this regard, the district court noted that the administrative remedy here provided by Congress was a comprehensive scheme of review which afforded Bell an adequate administrative remedy, and then provided for judicial review of final administrative orders by the appropriate Court of Appeals. 29 U.S.C. §660. In so holding, we find no error on the part of the trial court.

The majority of circuit courts considering this matter have held, as did the

district court in the instant case, that a district court should decline to exercise jurisdiction where the administrative process has been commenced, and that the employer should await final administrative action and then obtain judicial review by the appropriate Court of Appeals. Such holdings have been based on either of two grounds: (1) failure to exhaust administrative procedures; or (2) in the exercise of its equitable power, a district court, under the circumstances, should refrain from granting relief. In support of the foregoing, see such cases as: Baldwin Metals Co., Inc. v. Donovan, 642 F.2d 768 (5th Cir.), cert. denied, 454 U.S. 893 (1981); Matter of J. R. Simplot Co., 640 F.2d 1134 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); Marshall v. North American Car Co., 626 F.2d 320 (3rd Cir. 1980); Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979); Marshall v.

Central Mine Equipment Co., 608 F.2d 719 (8th Cir. 1979); In re Worksite Inspection of Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979). We are in accord with the result and rationale of these cases, and on that basis, we affirm. Bell's efforts to distinguish those cases from the instant one are not persuasive. Bell also suggests that we follow the rationale of, and the result reached in, Weyerhaeuser Co. vs. Marshall, 592 F.2d 373 (7th Cir. 1979). We prefer to follow the rule of the other cases above cited.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-1677

May Term - July 27, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitensein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

ROBERT K. BELL ENTERPRISES, INC., an Oklahoma corporation,

Plaintiff-Appellant,

vs.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor; EULA BINGHAM, Assistant Secretary of Labor, United States Department of Labor, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; JAMES P. JOHNSON, OSHA Acting Area Director; DERL W. HOUGHTON, OSHA Compliance Officer; and the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Defendants-Appellees.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

By Robert L. Hoecker
Chief Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT K. BELL ENTERPRISES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 78-C-545-E
RAY MARSHALL, Secretary of Labor, United States Department of Labor, et al.,	)	
Defendants.	)	

ORDER

This case involves the validity of an OSHA inspection warrant. The Tulsa area office of OSHA sent a compliance officer to inspect Plaintiff's amusement park on June 14, 1978, but the officer was refused permission to conduct his inspection. The compliance officer then applied to U. S. Magistrate Claudine S. Barnes for an inspection warrant, which was issued on August 24, 1978. That same day, the officer returned to Plaintiff's

place of business, and was allowed to conduct his inspection pursuant to the warrant. Shortly after the completion of the inspection, on August 30, 1978, the Secretary issued a citation to Plaintiff alleging that certain unsafe conditions existed. Plaintiff duly contested the citation before the OSHRC. On November 2, 1978, Plaintiff instituted this action, alleging the inspection warrant was unlawful and in violation of the Fourth Amendment, and requesting that the warrant be quashed and that any information or evidence obtained therefrom be suppressed. Plaintiff also sought to have the Defendants enjoined from taking any further action with regard to the inspection warrant, the inspection, any information or evidence received therefrom, the citation, the penalty notice, and the administrative action. On November 20, 1978, Defendants filed their motion to dismiss. On November 22, 1978, the OSHRC

stayed the administrative proceedings pending a decision by this Court. On that same date, the matter was referred to U. S. Magistrate Robert Rizley, for findings and recommendations on Defendant's motion. These were filed on April 24, 1979. The Magistrate recommended that the motion to dismiss should be sustained. Plaintiff duly objected to the findings and recommendations of the Magistrate.

On August 10, 1979, this action was stayed pending the Tenth Circuit's decision in Marshall v. Horn Seed Co., No. 79-1501. That decision was rendered on April 7, 1981, and clarifies in this Circuit the standards by which such warrants are to be measured.

The question which the Court now confronts, however, is a narrow one: under the circumstances of this case, must the Plaintiff exhaust its administrative remedies before it may challenge the constitutionality of an OSHA inspection? It is the Court's

conclusion that Plaintiff must.

Six Circuits have considered this question, and five have determined that in cases such as this exhaustion is required, and the district court should refrain from exercising its jurisdiction. See Baldwin Metals Co. v. Donovan, 642 F.2d 768 (Fifth Cir. 1981); Matter of J. R. Simplot Co., 640 F.2d 1134 (Ninth Cir. 1981); Marshall v. North American Car Co., 626 F.2d 320 (Third Cir. 1980); Babcock & Wilcox Co. v. Marshall, 610 F. 2d 1128 (Third Cir. 1979); Marshall v. Central Mine Equipment Co., 608 F.2d 719 (Eighth Cir. 1979); In re Worksite Inspection of Quality Products, 592 F. 2d 611 (First Cir. 1979); but see Weyerhaeuser Co. v. Marshall, 592 F. 2d 373 (Seventh Cir. 1979).

After an examination of these cases, in light of the comprehensive scheme of review and the administrative process created by Congress for matters of this type,

this Court concludes that the better reasoned approach is for the district court to decline to exercise it jurisdiction, leaving the Plaintiff to pursue his claims through the administrative process and the Court of Appeals.

It is, therefore, the decision of this Court that the Plaintiff's objection to the findings and recommendations of the Magistrate be overruled, and the Court hereby adopts the recommendations of the Magistrate, as supplemented by the authority cited herein.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss be, and the same hereby is, sustained, and this action is hereby dismissed.

It is so Ordered this 20th day of May, 1981.

JAMES O. ELLISON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT K. BELL ENTERPRISES, INC., an Oklahoma corporation,	)	CIVIL ACTION FILE
Plaintiff,	)	
vs.	)	No. 78-C-545-D
RAY MARSHALL, Secretary of Labor, United States Department of Labor; EULA BINGHAM, Assistant Secretary of Labor, United States Department of Labor; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; JAMES P. JOHNSON, OSHA Acting Area Director; DERL W. HOUGHTON, OSHA Compliance Officer; and the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,	)	
Defendants.	)	

FINDINGS AND RECOMMENDATIONS
OF THE MAGISTRATE

This cause came for hearing on the 5th day of March, 1979, upon the Defen-

dant's Motions to Dismiss. The Plaintiff appeared by its attorney, Bradford S. Baker, and the Defendants appeared by their attorneys, George C. Carrasquillo, Assistant United States Attorney; Robert C. Gombar, General Counsel, Occupational Safety and Health Review Commission; and Eloise Vellucci, Attorney, Solicitor's Office, United States Department of Labor.

For the reasons stated herein, the Magistrate finds that the Motions to Dismiss of Defendant Occupational Safety and Health Review Commission and Defendants Secretary of Labor, et al., should be sustained.

This action is brought under 28 U.S.C. §1331, 1337, 1346(a)(2). Venue lies within the Northern District of Oklahoma under 28 U.S.C. § 1391 (e)(2).

Plaintiff, Robert K. Bell Enterprises, Inc., is the operator of an amusement park in Tulsa, Oklahoma. Defendants, Ray Marshall, Eula Bingham, Occupational Safety

and Health Administration ("OSHA"), James P. Johnson, and Derl W. Houghton, are in varying degrees, statutorily responsible for monitoring the workplaces of employers to assure compliance with occupational safety and health standards issued pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Defendant Occupational Safety and Health Review Commission ("Commission") is an independent executive agency, separate from the Department of Labor, charged with "carrying out adjudicatory functions under the Act." 29 U.S.C. §651 (b) (3).

Compliance officers representing the Secretary of Labor ("the Secretary") are authorized to inspect workplaces and issue citations if they believe that an employer has violated a provision of the Act of a regulation promulgated thereunder. 29 U.S.C. §§ 657 (a), 658 (a), 659 (a). These inspections, to be constitutionally

valid, must, in the absence of employer consent, be conducted with an inspection warrant. Marshall vs. Barlow's, Inc., 436 U.S. 307 (1978).

A cited employer has fifteen working days from receipt of a citation and notification of a proposed penalty in which to notify the Secretary that he wishes to exercise his right to contest all or part of the Secretary's enforcement action. 29 U.S.C. §659 (a). An employer's election to exercise his right to contest initiates a proceeding before the Commission. 29 U.S.C. § 659 (c).

Once a citation is timely contested, it is docketed and the parties are given the opportunity for a hearing before an administrative law judge of the Commission. §§ 659 (c), 661. After the hearing, the administrative law judge is required to issue a report "based on findings of fact, affirming, modifying or vacating the Sec-

retary's citation of proposed penalty, or directing other appropriate relief." 29 U.S.C. §§ 659 (c), 661 (i). The administrative law judge's decision becomes a final order of the Commission thirty days after the filing of the report with the Commission, unless within that time a Commission member directs that the decision be reviewed by the full Commission. 29 U.S.C. § 661 (i).

After the Commission has issued a final order, either in the form of an unreviewed judge's decision or a final order of the full Commission upon review, "any person adversely affected or aggrieved" by that order may obtain review by filing a petition within sixty days in an appropriate United States court of appeals within sixty days after service of the Commission's order. 29 U.S.C. §660 (b).

In the present case, the Tulsa Area

Office of OSHA sent a compliance officer to conduct an inspection of Plaintiff's amusement park. On June 14, 1978, the compliance officer attempted to inspect Plaintiff's workplace, but was refused permission to conduct an inspection.

On August 24, 1978, the compliance officer applied for and obtained an inspection warrant issued by U. S. Magistrate Claudine S. Barnes. On that day, the compliance officer returned to Plaintiff's workplace and was permitted to conduct an inspection of Plaintiff's workplace.

On August 30, 1978, the Secretary issued a citation to Plaintiff alleging that numerous unsafe conditions were discovered during the inspection. Plaintiff filed a timely notice of contest on or about September 16, 1978, thus invoking jurisdiction of the Commission.

On November 2, 1978, Plaintiff filed

the present action, alleging that the inspection warrant was unlawful and in violation of the Fourth Amendment, and that all evidence from the inspection was illegally obtained. Plaintiff requests that the warrant be quashed, that any evidence obtained during the search be suppressed, and that a permanent injunction be issued restraining Defendants from taking any further action with respect to the warrant, the search, any evidence obtained therefrom, or the citation.

On November 22, 1978, the Commission stayed the administrative proceedings in this case pending a decision by this Court.

In their Motions to Dismiss, the Defendants urge that Plaintiff should litigate before the Commission rather than in district court its claim regarding the validity of the warrant. In essence, Defendants argue that the statutorily-created review procedure is adequate to handle

the matter at issue and that this Court is not presented with the type of exceptional circumstances required to warrant an interference with the administrative remedy. In addition to administrative exhaustion arguments presented by all Defendants, the Secretary of Labor also argues for the validity of the underlying warrant. Since the Commission considers the question of the warrant's validity to be before it for decision, it takes no position on this latter argument.

Where a particular action sought to be reviewed falls within the special expertise of an administrative agency, that agency should be given the opportunity to exercise its jurisdiction to decide the issue. See Best v. Humbolt Placer Mining Co., 371 U.S. 334,338 (1963). This is so notwithstanding the presence of constitutional questions in the case. Human Resources Management, Inc. vs. Weaver, 442

F. Supp. 241 (D.D.C. 1977).

In its capacity as the central forum for adjudications under the Act, the Commission is authorized to pass on all factual and statutory defenses available against the enforcement actions of the Secretary. Matter of Restland Memorial Park, 540 F 2d 626 (3d Cir. 1976). The challenges raised by Plaintiff constitute defenses that fall within this ambit of Commission authority. Moreover, Plaintiff has invoked the jurisdiction of the Commission by filing its notice of contest. Where Commission proceedings are in progress, the Tenth Circuit has recognized that the proper method for judicial review of challenges to the validity of an OSHA inspection is upon review of a final Commission order. Robberson Steel Co. v. Marshall and O.S.H.R.C., No. 78-1350 (10th Cir., October 30, 1978).

Plaintiff's challenges to the warrant

and the manner of the inspection can be adequately considered in the statutory enforcement proceeding either by the Commission or by the appellate court during a review of the Commission decision. Quality Products, Inc., No. 78-1232 (1st Cir., Feb. 16, 1979). Furthermore, since there are no extraordinary circumstances in this case warranting district court review, the court should defer review of this matter to the Commission. See Quality Products, Inc., supra; Nader v. Volpe, 466 F 2d 261 (D.C. Cir. 1972).

It is therefore recommended that the Defendant's Motions to Dismiss be sustained.

Dated this 24th day of April, 1979.

ROBERT S. RIZLEY
United States Magistrate

No. 83-633

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT K. BELL ENTERPRISES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly declined to entertain a suit to quash an executed administrative inspection warrant, issued under the Occupational Safety and Health Act of 1970, and to suppress evidence obtained during the inspection, where judicial review of the validity of the warrant is available in the court of appeals as part of the Act's administrative enforcement process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 710 F.2d 673. The order of the district court (Pet. App. C1-C5) is unofficially reported at 1981 O.S.H. Dec. (CCH) para. 25,433.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on July 27, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Robert K. Bell Enterprises, Inc. operates an amusement park in Tulsa, Oklahoma. On August 24, 1978, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected petitioner's premises

pursuant to an inspection warrant based on employee complaints of unsafe conditions. Pet. App. A2-A3, C1-C3.[1] As a result of the inspection, the Secretary, on August 30, 1978, issued a citation charging petitioner with violations of the Act (*id.* at A3, D6). Petitioner filed a timely notice of contest to the citations on or about September 16, 1978, thereby invoking the jurisdiction of the Occupational Safety and Health Review Commission (the Commission) (*ibid.*).[2]

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[1]The Secretary is authorized to conduct administrative inspections of workplaces by Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), which provides:

> In order to carry out the purposes of [the Act], the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

Pursuant to Section 8(f) of the Act, 29 U.S.C. 657(f), which is set forth in pertinent part at Pet. viii-x, the Secretary is also required to conduct administrative inspections in response to an employee complaint. This Court has previously examined the Secretary's authority to inspect worksites in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

[2]The Act provides for an administrative enforcement process followed by judicial review. After inspecting a workplace, the Secretary is empowered under the Act to issue citations to an employer for violation of the Secretary's regulations or the Act's "general duty" clause (29 U.S.C. 654(a)(1)). The citation must specify safety and health violations and fix reasonable abatement times for the correction of these violations, and may propose penalties. 29 U.S.C. 657(a), 658(a), 659(a). Citations that are not contested by the employer within 15 working days become final. 29 U.S.C. 659(a). If the employer timely notifies the

2. On November 2, 1978, petitioner filed this action for declaratory and injunctive relief in the United States District Court for the Northern District of Oklahoma, seeking to quash the warrant and suppress the evidence obtained in the course of the inspection (Pet. App. A3-A4, C2). The Commission stayed the administrative proceedings pending resolution of the district court proceedings (*id.* at A4, C2-C3).

On May 20, 1981, the district court dismissed petitioner's action on the ground that petitioner had failed to exhaust its administrative remedies (Pet. App. C1-C5). The court, therefore, left petitioner to pursue its claims through the "comprehensive scheme" of administrative and judicial review "created by Congress for matters of this type" (*id.* at C4-C5).

3. The court of appeals affirmed (Pet. App. A1-A8), holding that where the administrative process has been commenced, an employer must exhaust its administrative remedies in proceedings before the Commission before contesting the constitutionality of an inspection warrant in judicial proceedings. The court noted that its decision was in accord with the decisions of six other circuits, which have

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Secretary of his intention to contest a citation, he is afforded a hearing before an administrative law judge. 29 U.S.C. (& Supp. V) 659(c), 651(b)(3), 661. The judge's report becomes a final order of the Occupational Safety and Health Review Commission unless a Commissioner directs further review. 29 U.S.C. (Supp. V) 661(i); 29 C.F.R. 2200.90. If the employer is not satisfied with the Commission's disposition of his claim, he may obtain review of the order in the court of appeals. 29 U.S.C. 660(a). The decision of the court of appeals is reviewable in this Court on a writ of certiorari. 29 U.S.C. 660(a); 28 U.S.C. 1254(1). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-447 (1977).

held that a district court should decline to exercise jurisdiction in these circumstances. *Id.* at A7-A8.[3] The court rejected petitioner's effort to distinguish those decisions as unpersuasive, and it expressly declined to follow the contrary ruling of the Seventh Circuit in *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373 (1979), stating that it preferred to follow the rule requiring exhaustion of administrative remedies.

ARGUMENT

The decision of the court of appeals is correct, is in accord with the decisions of six other courts of appeals, and does not warrant review. Indeed, the Court has already declined to review a claim identical to the one presented by petitioner. *Mosher Steel Co.* v. *Donovan*, cert. denied, 454 U.S. 893 (1981).

1. The doctrine of exhaustion of administrative remedies is well established, both in the administrative context generally, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), and in the OSHA context in particular. *Frank Irey, Jr., Inc.* v. *Hodgson*, 354 F. Supp. 20 (N.D. W. Va.) (three-judge court), aff'd, 409 U.S. 1070 (1972); *In re Restland Memorial Park*, 540 F.2d 626 (3d Cir. 1976). The court below properly concluded (Pet. App. A6-A7) that the comprehensive scheme of administrative and judicial review provided by Congress affords petitioner an adequate administrative remedy requiring exhaustion.

As the courts have recognized, important policy considerations require exhaustion in these circumstances. See, *e.g.*, *Baldwin Metals Co.* v. *Donovan*, 642 F.2d 768, 771,

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[3]The court of appeals noted (Pet. App. A5 n.*) that the Secretary's citation against petitioner was vacated by an administrative law judge on the ground that the Secretary failed to show that petitioner is an employer affecting interstate commerce. The Secretary's appeal to the Commission from that order is still pending.

773 (5th Cir.), cert. denied, 454 U.S. 893 (1981); *Marshall* v. *Whittaker Corp.*, 610 F.2d 1141, 1148 (3d Cir. 1979). First, an exhaustion requirement protects the autonomy of agency proceedings. Where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Congress established the Occupational Safety and Health Review Commission as a central forum for adjudication of all citations issued by the Secretary for violation of the Act's safety and health requirements. In creating this enforcement mechanism, Congress struck a balance between the need for swift implementation of abatement orders and the provision of due process protections for affected employers. Interference with this scheme by employers seeking to invoke the powers of the district courts to quash executed warrants "might well sunder the statutory balance" (*Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d 1128, 1140 (3d Cir. 1979)), and " 'would afford much opportunity for abuse for dilatory purposes, to the detriment and possible disruption of effective law enforcement' " (*id.* at 1141, quoting *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611, 616 (1st Cir. 1979) (footnote omitted)). Accordingly, exhaustion is "required as a matter of preventing premature interference with agency processes." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

Second, the exhaustion requirement offers the possibility of mooting the constitutional issue. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1954). An agency resolution favorable to the employer on

the merits of the citation, for example, would make the relief sought by the employer redundant and would accordingly obviate the need for a judicial determination of the constitutionality of the warrant. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 771-772; *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1138. Cf. *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d at 616; *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d 719, 722 (8th Cir. 1979). This is consistent with the well settled practice of avoiding constitutional adjudication whenever possible. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).[4]

Nor do any of the recognized exceptions to the exhaustion requirement apply here. Exhaustion is not required where there is no available administrative remedy, *Greene* v. *United States*, 376 U.S. 149, 163-164 (1964), where the available administrative remedy is inadequate to prevent irreparable harm, *McNeese* v. *Board of Education*, 373 U.S. 668, 674-676 (1963), or where blatant violations of constitutional or statutory rights have taken place. *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir.

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[4]The possibility of mootness is manifest in the instant case, since an administrative law judge has in fact vacated the Secretary's citation. See note 3, *supra*. Unless the Secretary prevails in appealing the interstate commerce issue, the termination of the administrative proceedings will moot the need for judicial resolution of the constitutional questions arising from the issuance of the warrants. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 n.11 (1980); *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1138.

The theoretical possibility, adverted to by petitioner (Pet. 14), that an action for damages could be brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), does not prevent the constitutional issue from being mooted in the statutory enforcement proceedings. Even assuming that a *Bivens* action could be brought in the OSHA context, petitioner did not request damages in its complaint.

1979), cert. denied, 444 U.S. 1074 (1980); *Fitzgerald* v. *Hampton*, 467 F.2d 755, 768 (D.C. Cir. 1972). Here, however, it is clear that the administrative remedy is adequate. Requiring exhaustion will not irreparably injure the employer, because the alleged constitutional violation has already occurred and because the employer may obtain complete relief on its constitutional claims in the court of appeals. 29 U.S.C. 660(a). In addition, the record contains no evidence of disregard by OSHA officials for the constitutional rights of petitioner, much less of blatant violations. The inspection in this case was conducted in furtherance of the Secretary's responsibility for insuring the health and safety of employees in the nation's workplaces and pursuant to a warrant obtained in good faith from the appropriate judicial officer.

The court below was also correct in holding (Pet. App. A7-A8), as have other courts of appeals in similar cases, that the district court should in any event have declined to exercise its equitable jurisdiction to entertain the suit. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 775-777; *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d at 721-722; *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d at 615-616. A district court's power to consider the admissibility of evidence in a separate proceeding is exceptional in nature; it has been termed the "anomalous" jurisdiction (*Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965)), and its exercise is subject to equitable restraints. *Hunsucker* v. *Phinney*, 497 F.2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Thus, a district court should decline to exercise its jurisdiction in the absence of a danger of irreparable injury, the possibility of an inadequate remedy at law, or the existence of a callous disregard for constitutional rights. As discussed above (see

page 7, *supra*), none of these prerequisites is met in this case.[5]

2. Petitioner correctly notes (Pet. 7-8) that the decision below is contrary to the Seventh Circuit's decision in *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373 (1979), but that conflict does not, in our view, provide a sufficient basis for review by this Court.[6] As the Fifth Circuit has observed (*Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 772, 774-775), the Seventh Circuit in *Weyerhaeuser* plainly erred in concluding that an administrative decision in favor of the employer would not moot the issue of the constitutionality

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[5]While, as petitioner notes (Pet. 9), the warrant application in this case may not have provided the detailed information suggested by the court in *Marshall* v. *Horn Seed Co.*, 647 F.2d 96, 103 (10th Cir. 1981), that does not reflect a disregard for petitioner's rights. Rather, it results from the fact that the application was filed in 1979 and *Horn Seed* was decided in 1981.

[6]Petitioner also asserts (Pet. 8-16) that the decision below is in conflict with other appellate decisions and with decisions of this Court. This assertion is without merit. The cases cited by petitioner, insofar as they indicate that exhaustion may not be required in instances of clear constitutional violations, are inapplicable to this case because the constitutional issue is not clear-cut and requires factual development. Even assuming, arguendo, that the warrant application did not furnish probable cause, petitioner's workplace is an amusement park open to the public. A factual record is therefore necessary to determine whether petitioner had a reasonable expectation of privacy with respect to the inspected area. As this Court noted in *Barlow's*, "[w]hat is observable by the public is observable, *without a warrant*, by the Government inspector as well." 436 U.S. at 315 (footnote omitted; emphasis added). Cf. *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983); *Donovan* v. *Dewey*, 452 U.S. 594, 608-609 (1981) (Rehnquist, J., concurring).

Petitioner's reliance (Pet. 10) on *Dravo Corp.* v. *Marshall*, 5 O.S.H. Cas. (BNA) 2057 (W.D. Pa. 1977), aff'd, 578 F.2d 1373 (3d Cir. 1978), is also misplaced. That case involved a warrant that had not been executed, and the district court was able as a result to prevent the search (and any consequent irreparable harm) from taking place. See also *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 971 (3d Cir. 1980).

of the warrant. In reaching that conclusion, the Seventh Circuit purported to distinguish between the injury resulting from the citation and the injury resulting from the inspection itself, and held that while a Commission ruling in favor of the employer would relieve the former, it could not moot the latter.

But the relief sought in this case, like that sought in *Weyerhaeuser*, is directed at foreclosing any administrative action based on the fruits of the inspection. Any Fourth Amendment injury caused by an unconstitutional inspection is fully accomplished by the inspection itself and can never be repaired. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Hence, while there is indeed a distinction between the injury resulting from the inspection and the injury resulting from the citation, the declaratory and injunctive relief sought in cases like the one at bar concerns solely the latter, and any constitutional issue arising from the use of the fruits of the inspection to support the citation is therefore rendered moot by dismissal of the administrative proceedings.[7] See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 774; *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1134.

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[7]The decision in *Weyerhaeuser* was based in part on the Seventh Circuit's belief that no benefit would be derived from requiring exhaustion because the Commission would not rule on the validity of an inspection warrant. 592 F.2d at 376-377. Since *Weyerhaeuser* was decided, the Commission has in fact passed on constitutional questions relating to the use of evidence obtained pursuant to allegedly invalid warrants. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 774 n.11. Regardless of whether the Commission is authorized to decide these questions, the availability of judicial review prevents the employer from suffering irreparable injury as a result of being required to exhaust its administrative remedies.

We note that *Weyerhaeuser* was the first court of appeals decision on the question whether a district court is the proper initial forum to review the validity of an executed OSHA inspection warrant. Since the Seventh Circuit's decision in *Weyerhaeuser*, seven other courts of appeals, including the Tenth Circuit in this case, have considered the question and rejected the Seventh Circuit's analysis. See *United States* v. *Cleveland Electric Illuminating Co.*, 689 F.2d 66 (6th Cir. 1982); *Baldwin Metals Co.* v. *Donovan, supra*; *J.R. Simplot Co.* v. *OSHA*, 640 F.2d 1134 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *Babcock & Wilcox Co.* v. *Marshall, supra*; *Marshall* v. *Central Mine Equipment Co., supra*; *In re Worksite Inspection of Quality Products, Inc., supra*.[8] In light of the overwhelming authority requiring exhaustion, there is no immediate need for this Court to address the issue.

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[8]The Seventh Circuit followed *Weyerhaeuser* in *Federal Casting Division, Chromalloy American Corp.* v. *Donovan*, 684 F.2d 504, 507-508 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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